Some Considerations on the Legal-Tender Decisions.

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No decisions of our Supreme Court possess a more enduring interest for the student of our Constitutional History and Law than those rendered in the so-called Legal-Tender Cases. They are memorable on account of a number of important and in some respects unique circumstances. The question at issue belongs to the most important questions which have ever come before that court for adjudication, being nothing less than the power of the Federal Legislative to fix the legal means of payment at its discretion. It involved the right of the Federal Government to abolish gold and silver coin as the only means of debt payment, and substitute therefore mere pieces of paper, bearing the promise of the government to pay at its pleasure. It is, of course, difficult to conceive of a more far-reaching power, or one which, if exercised in certain ways, could affect more intensively our industrial society.

Additional interest is lent to the cases by the fact that the Chief Justice of the Court, when the first case came before it, was the man, who as Secretary of the Treasury, was chiefly responsible for the very legisla-

tion, the constitutionality of which he was now called upon to determine; by the further fact that a decision rendered in one year was reversed by the court almost within a twelve month; and by the circumstance that a third decision was rendered within less than fifteen years, which, though not reversing, but rather confirming the decision of the court in the second case, yet repudiated, or at least ignored entirely the reasoning upon which the court had rested its opinion on that occasion.

An unpleasant sort of interest is moreover attached to it because of the deplorable fact that in connection with these decisions the charge of partisanship was openly made, and what is still more to be regretted, widely believed, even the Chief Justice himself not being able to conceal altogether his opinion that the decision in the second case was the result of conscious desire on the part of the executive to influence the action of the court in the direction of approving the course of the Legislative department. The opinions of the various members of the court give evidence of the excitement and bitterness of the discussion.[1]

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[1]The following letter from Judge Hoar to the writer is of great interest apropos of this charge:

WORCESTER, June 18, 1887.

MY DEAR SIR—The pressure of some important professional and other duties has brought my correspondence sadly behindhand. I have to ask your pardon for great delay in answering your letter.

No sillier calumny was ever uttered on the stump than that which imputes the selection of Judges Strong and Bradley to a desire to reverse the legal-tender decision. Their names were sent to the Senate before that decision was made. General Grant, Secretary Fish and Attorney-General Hoar have emphatically denied the charge. There never was the smallest particle of evidence in its favor that I ever heard. Certainly no reason need be sought for their selection other than the character and learning of the men. Judge Strong

These cases taken together illustrate some of the most important features of our constitutional and political life, and connected as they are at several points with decisions running back in an unbroken line for nearly a century, they offer us an excellent example of our methods of solving difficult constitutional questions, and admirably illustrate the principles of constitutional interpretation which underlie our whole system of law and politics.

They show forth in a clear light, for instance, the great influence which the executive and legislative may have on the attitude of the court toward constitutional questions, even though they may not exercise their undoubted privilege of affecting the make-up of the court by adding new men. If, for example, it had been possible to get the court to express its opinion of the constitutionality of such legislation, before it had been actually made, i. e., in advance of the pas-

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has lately retired from active duty with universal respect—a model of the judicial character. I suppose the general voice of the profession and of his brethren of the bench would place Judge Bradley at the head of all living American jurists. It would have been difficult, if not impossible, to have found a republican fit for that high judicial position who was not of their way of thinking on the legal-tender question. The Supreme Court of every Northern State where the question was raised, and that was nearly all, had held the same way, as had the eminent Chancellor of Kentucky.

Judge Hoar, General Grant's Attorney-General at the time of the nomination of these two judges, on whose advice they were selected, stated some time since in a public letter, that he knew when the nomination was made that Judge Strong, in an opinion delivered when on the Supreme Bench of Pennsylvania, had upheld the legal-tender act; but that he knew nothing of Judge Bradley's views, except that as counsel for a railroad, he had advised them that they were bound in honor to pay previously contracted debts in gold.

I am, yours very respectfully,

GEO. F. HOAR.

sage of the legal-tender laws, it is possible that we have never had a court which would have held such legislation to be constitutional. Whereas, after the laws had been actually passed, and been in force for years, we found a court to decide that they were constitutional as war measures, and fourteen years later another one which declared them to be constitutional, no matter whether passed in times of war or peace.[1]

The reason for this is obvious. If it had been possible to get the opinion of the court beforehand, the latter would have been bound to be sure that the proposed laws were constitutional before it could say so, i. e., it must have been positively sure beyond a reasonable doubt. In other words, it would then have occupied the position which every legislature should take. On the other hand, when the bill came up before them as an accomplished fact, it came with all the prestige that accompanies the act of another and coordinate branch of the government. The presumption is in all such cases in favor of its constitutionality. The courtesy due a separate and independent branch of the government requires great care and caution in treating such cases, or as Justice Chase puts it in that first decision, declaring the legal-tender laws unconstitutional, so far as applicable to debts contracted before their passage : "The court always approaches the consideration of questions of this nature reluct-

[1] In some of the States notably, Maine, New Hampshire and Massachusetts, the Governor, council, or either House of the Legislature may call upon the Supreme Court to give their opinions upon important questions of law or upon solemn occasions. If this were allowed by the Constitution of the United States, it would be possible to get the opinion of the court beforehand, and it is probable that the course of our constitutional development would have been somewhat different.

antly, and its constant rule of decision has been, and is, that acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise."

Justice Strong puts it still more emphatically in the second legal-tender case:

"A decent respect," he says, "for a coördinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgress of powers by Congress, all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. In the case of Commonwealth vs. Smith (Binney 4, 123), the language of the court was: 'It must be remembered, for weighty reasons, it has been assumed as a principle in construing constitutions, both by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States, that an act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for a reasonable doubt.' It is incumbent therefore upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." [1]

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[1] "A reasonable doubt," says Judge Cooley, "in summing up a discussion of this subject, must be solved in favor of the legislative action and the act be sustained." (Constitutional Limitations, p. 218). *If an act may be valid or not, according to circumstances, a court would be bound to presume that such circumstances existed as would render it valid.* (Talbot vs. Hudson, 16 Gray. 417.) This is of special interest in connection with the third legal-tender case in which it was decided that if Congress could pass a legal-tender law as an exigency law, the court would be bound to assume an exigency when such a law was passed.

Harris, J., New York Court of Appeals, 17, N. Y. 235, declared: A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul by judicial sentence what has been enacted by the law-making power, it should clearly appear that the act cannot be supported *by any reasonable intendment or allowable presumption.*

It is reasonable to expect that where a construction has once been placed upon a constitutional provision it will be followed afterwards,

It is evident that so long as this continues to be the attitude of the court, and that will doubtless be as long as the court shall last, the legislative branch has a great vantage ground in deciding what shall be the interpretation put upon the various clauses of our constitution, since by adopting any given interpretation, as evidenced by the passage of a particular law, they thereby raise a presumption in favor of an interpretation which maintains the contitutionality of action already taken.

All this is, of course, entirely aside from the influence which the legislative branch may exercise by adding new members to the court whose opinions are known beforehand. The first legal-tender case was argued in the December term of 1867, and was then postponed for a fuller argument until the December term of 1868. During the pendency of the cases two vacancies occurred on the bench, one by resignation of an existing member, and one by a law of Congress providing for an additional justice.

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even though its original adoption may have sprung from deference to legislative action rather than from settled convictions in the judicial mind. (Cooley, Const. Limit., p. 220; People vs. Blodgett, 13 Mich., 127).

So strong is this legal principle that the court (in the case of Rogers vs. Goodwin, 2 Mass., 475; Cooley's Limitation, p. 84), said of a certain construction: "Although if it were now *res integris* it might be very difficult to maintain such a construction, yet at this day the argument *ab inconvenienti* applies with great weight. We cannot shake a principle which has so long and steadily prevailed."

The Supreme Court of Massachusetts, 14 Allen, 389, held that the constitutionality of the act of Congress making treasury notes a legal-tender, ought not to be treated by a State Court as an open question after the notes had practically constituted the currency of the country for five years. (Cf. Cooley, Constitutional Limitations, p. 218.)

The decision declaring the legal-tender laws unconstitutional was read February 7th, 1870, and was supported by a majority vote of two in a court of eight justices. The resignation of Justice Grier, together with the new position, left two places to be filled. To these Justices Strong and Bradley were appointed. Justice Strong had already in Pennsylvania rendered an elaborate opinion from the Supreme Bench of that State in favor of the constitutionality of this legislation, and it was claimed that the sentiments of Justice Bradley were also know to be in favor of this side of the case. However this may be, the whole thing shows how easily this conjuncture of affairs could have been used for just such a purpose, and it is noteworthy that one of the immediate results of the new appointments was a reconsideration of the matter in the case of Knox vs. Lee, and a reversal of the opinion of the court by a majority of one in a court of nine justices.

Another remarkable feature of these cases, or rather decisions, is the almost unanimous character of the last, and most sweeping one of all, as compared with the close votes of the court on the preceding cases. Five to three stood the first vote. Five to four the vote that reversed the first decision and rested the right of Congress to pass such laws on the war powers of the constitution; while the last, which decided that Congress had such power also in times of peace, was rendered by a vote of eight to one. This phenomenon can hardly be explained by the supposition that the court was slowly but steadily packed for this special purpose in the way indicated above as a possible one.

Equally noteworthy is the entirely different char-

acter of the reasoning in the last and the two former cases. The discussion in both the first cases turned on what was essentially an economic point. The Court in the case of Hepburn vs. Griswold, held that conferring the legal-tender character upon the notes of the government was not a necessary or appropriate means of carrying out any of the functions of the government, because as a matter of fact this circumstance did not improve the quality of the notes as currency. This view was supported by what was essentially an economic argument on the nature and functions of a government currency. In the decision Knox vs. Lee, the court joined direct issue on this very point, and maintained that the legal-tender character was necessary to make these notes serve the purpose for which they were issued, and that they were therefore a necessary and proper means of carrying into effect an acknowledged power of the Federal Government.

In the last case the court quietly passes over this whole argument and rests the decision upon what is much more a legal or constitutional ground. In both the former cases the court was evidently influenced, to a large extent, by what it supposed would be the economical evils of a contrary decision. In the last the court refused to ask itself the question whether the issue of legal-tender notes is or is not, economically speaking, a good or bad thing, and confined itself simply to the question whether Congress had the power or not.

This is, indeed, one of the interesting circumstances connected with this whole question, whether before the court, or in the press and on the rostrum before the general public. The court is besought by those

opposed to the policy of issuing such currency to save the country from the evil effects of legal-tender notes, by declaring that Congress has no power to issue them. This of course is no proper appeal to make to the court. It has to decide a question of law and not of policy ; and no matter how clear the court might be that such and such a policy might be injurious, it has no business to place its veto on it, provided the body establishing the legislation has the power as a matter of law so to do. It will be found, I think, that this element of expediency of the exercise of the power in a certain way has largely influenced many in their judgement as to the actual conferring of the power as a matter of law.

This is acknowledged in a recent pamphlet devoted to an examination of Mr. Bancroft's "Onslaught on the Court,"[1] by Mr. McMurtrie of the Philadelphia bar—a man who is reputed to be one of the most clear-headed constitutional lawyers in the country. In one passage in the pamphlet referred to, he says, that he had always supposed that the decision of the question hinged really on whether one would take the strictly legal or the statesman's view of the subject, which of course means whether one would regard it as a question of law, which it really is, or of politics, which it is not.

Let us now look squarely at the case as it appeared before the court, with a view of arriving at an opinion as to the merits of the case from a constitutional point of view. In presenting the arguments, I shall use the best statement of them which I have been able to find, whether in the opinion of the court, the argument of counsel or the brochures of publicists.

[1]The Constitution wounded in the House of its Friends.

Congress had actually passed a law making its notes a legal-tender. This creates a presumption clear and distinct in favor of the constitutionality of the measure, according to the uniform decision of the courts of last resort in our country. I quoted above the opinion of the court as to the necessity of having a clear demonstration of the unconstitutionality of a measure, before it would upset the action of Congress. Chief Justice Chase himself, at the very session in which the Hepburn case was decided, held in Veazie Bank vs. Fenno, that the practice of the government was one of the elements in deciding a constitutional case.[1] In a word then, the burden of proof rests in a legal point of view, entirely upon those who attempt to establish the unconstitutionality of any given act of Congress.

In answer to this, it is held in the first place that the constitution, on its face, does not confer the power to issue legal-tender notes. If by this is meant that it does not confer that power in so many words, then it will of course be admitted. But it does not confer the power to carry on war, or to suspend the *habeas corpus* act, or to pass penal laws to sustain its legislation, or to establish a national bank, or to emit treasury notes, or to exercise the right of eminent

[1] Great deference has also been paid in all cases to the action of the Executive Department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations and endeavored to keep within the letter and spirit of the constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequence that may result from disregarding it, is fairly entitled to turn the judicial mind.—(Cooley's Limit. p. 83.)

domain, or to sue or to make contracts, or to collect statistics other than the mere numbering of the persons, or to construct canals or railroads, or assist in their construction, or to establish for itself a priority of payment over debts due to other creditors, or to establish observatories, or to erect light houses, etc., etc.—all of which are now acknowledged to be part and parcel of the powers conferred by the constitution.

If, however, what is meant is that the power is not included in any power expressly granted, then this is a question for investigation and examination. Has Congress any power whatever over the legal tender of the country? It must be admitted that, judging by the uniform practice of the government and the decisions of the courts, it has the power to make gold and silver, or any other metal, a legal tender. Now whence does it derive this power? It is certainly not expressly granted, for it is quite distinct from the power to coin money and regulate the value thereof. It can only be inferred as an incidental power. It would seem, indeed, from an examination of all the clauses bearing on the subject, both those relating to the restrictions on the states and those conferring powers in regard to it on the national government, that whatever power there is to make a legal tender has been confered on the Federal government. We shall return to this point later.[1]

It is urged that it was the intention of the framers of the constitution to prohibit the Federal government from exercising any such power. If this were really so, it would have been a very simple matter to incor-

[1] Cf. McMurtrie's argument.

porate their views in a clause like that referring to the states, forbidding them to make anything but gold and silver coin a legal-tender in the payment of debts. It may be replied to this that they thought they had, since they did not grant it in express terms, and the new government was to be a government of limited powers. This is not satisfactory, however, since the whole country gave, at the time of the adoption of the constitution, good evidence that they were afraid that a government had been constituted with they knew not what powers, as is amply shown by the first ten amendments.

However this may be, the whole argument from intention is met in the following way:

1. The intention has little to do with the question, the real point being not what they intended to do, but what they actually did do, as a matter of fact. No court of law allows intention to do a thing to be plead against a plain failure to do it. Even in the construction of wills, contracts, etc., the question is not what the person wanted to do, but what he did do. In other words intention is to be inferred from actually what is said. If any other principle were adopted there would be no way of settling questions of dispute where the parties to a contract, for example, have different ideas as to what the instrument means, since each one intended to do a different thing. Take a case, such as occasionally occurs in private law, and nearly always in public law, where the parties are trying to overreach each the other. Each hopes to get such provisions into the law or contract as will redound to his own benefit, or incorporate his own ideas. Now it is evident that no court could undertake to compare these various intentions, and see

which on the whole is the fairer or better, etc., and then put that into the law as the meaning.

2. Intention in the case of a public body, such as a legislature, as Mr. McMurtrie rightly argues in the pamphlets above mentioned, does not at all mean the same thing as intention when applied to morals, or that part of law founded on what we call the moral nature, i. e., consciousness of meaning or the exercise of will. The only reliable guide to intention is to look to the words and the circumstances under which they were used. People are held to mean what their words or acts infer. This is a perfectly well-accepted principle of law, and finds expression in many legal decisions which the court is bound to consider in deciding the case. No statute is construed by referring to the private gossip of the draughtsman, or even by statements made in debate. (Minnesota 10, 126.) As to any other instrument that is to be an authority or guide, and require construction, such as deeds, wills, contracts, etc., notoriously the most improper man on earth to expound a writing is the writer. He alone of all men can not distinguish clearly what is and what is not intended by what is written, and separate it from what floated in his mind but did not reach the paper. (3 Howard 24 Gibson, C. J.; Serg. & Rawle 12, 352; 7 Harris, 156; Black C. J. & Lewis 2 Casey 450.)[1]

[1] We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they are conferred. (Gibbons vs. Ogden, 9 Wheaton, 1-240; Meyer's Digest, §1183; C. J. Marshall.)

Though a particular object may have been in the contemplation of the Legislature, a court is not bound to conclude that they have done what they intended, unless fit words be used for that purpose. (1 Paine, 35.)

3. We are, therefore, not entitled, on principles of law, to inquire into intention in this case in the sense in which that term is ordinarily used, owing to the evident impossibility of really ascertaining it. It is well known that there was a difference of opinion as to the wisdom of conferring this power, and language was finally adopted which seemed to satisfy both parties. It is evident that

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The spirit of the act must be extracted from the words of the act, and not from conjectures. Aliunde, (Gardner vs. Collier, 2 Peters, 73).

The meaning of the Legislature is to be ascertained from the language of the statute. (Platt vs. Union Pacific, 9 Otto, 58.)

In expounding this law the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress, in the debate which took place on its passage; nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both Houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it when any ambiguity exists with the laws upon the same subject, and looking if necessary to the public history of the times in which it was passed. (Aldridge et. al. vs. Williams, 3 Howard, 24).

The object of construction is to give effect to the intent of the people in adopting it. But this intent is to be found in the instrument itself. (Cooley's Limitations, p. 68.)

To adopt the principle of looking beyond the instrument to ascertain its meaning, when it may be fairly inferred from the instrument itself, the constitution may be made to mean one thing by one man and something else by another, until in the end it is in danger of being rendered a mere dead letter. (People vs. Pardy, 2 Hill, 35).

It follows from these principles that the statute itself furnishes the best means of its own exposition, and if the sense in which the words were intended to be used can be clearly ascertained from all its parts and provisions, the intention thus indicated shall prevail without resorting to other means of aiding in the construction. And these familiar rules of construction apply with at least as much force to the construction of written constitutions as to statutes; the former being presumed to be framed with much greater care and consideration than the latter. (Green vs. Weller, 32 Miss., 650-678).

there is no ground here to found intention in any sense of that term which would correspond to its use in ordinary life. Moreover, we must remember that the men who drew this instrument were not the parties who enacted it into law. And certainly the latter are entitled to as much consideration in this matter as the men who drew the writing. This would lead us into an examination of the ideas and intentions of each man who voted for the ratification of the instrument. This is evidently absurd as a principle of law. The case is exactly analogous to one which we find every day in our ordinary legislatures, where one party wishes to adopt a certain policy and the other is opposed, and they finally agree on a law because each side thinks that it favors its own views. No court could go into an investigation of exactly what each member thought he was voting for, when he cast his vote on one side or the other. And it has repeatedly happened in the course of judicial decision in this country that the courts have held that a given law meant a very different thing from that which it seemed to most of the legislators who approved of it. Naturally enough, for the only question which the court has before it is not what the legislators though they were doing, but what they actually did do in the case.[1]

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[1]More than that the legislature is not even allowed by the courts to construe their own statutes after any action has occurred under them :

Statutes declaratory of the proper construction of a law are unconstitutional and void as far as they affect private transactions. (14 Otto, 677). This it will be seen is of such a sweeping character that even if the unanimous vote of the Constitutional Convention had been cast in favor of a given interpretation, the court would not only

However, suppose we waive this point, which actually bars out all reference to the intention of the framers, let us look a moment at the evidence of intention which is before us. The court in the last decision says: "The reports which have come down to us of the debates in the convention that framed the constitution afford no proof of any general concurrence of opinion upon the subject before us." This remark becomes the object of some pretty severe criticism on the part of Mr. Bancroft and others. And yet it seems plain that the court is justified in this view by the actual record of the convention.

The only debate which throws any light on this question was held on August 16th, 1787. It occurred on the proposition to cut out the words—"and emit bills of credit"—which formed part of the draft submitted to Congress. Morris was in favor of cutting it out with the idea that if the clause were dropped

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not be bound by it, but would be bound to declare that the opinion was valueless in point of law.

The meaning of a statute is to be ascertained from the language used and not by inquiring of the individual members of the legislature what they intended by enacting the law. If the natural import of the law is different from the effect intended to be given to it by those who were for it, the only safe rule is to take the act as it stands as conveying the intention of the legislature. (9 Otto, 58).

What passes in Congress upon the discussion of a bill can not become a matter of strict judicial inquiry in construing the statute, and little reliance ought to be placed upon such sources of information. (2 Story, 648).

As worded in another case:

It is not even allowable for a legislature, even by a formal vote, to construe a law which it has itself passed—except under such forms as may be taken to have established a new law; for the vote of a legislature, that a statute passed by it means such and such a thing, has been frequently disregarded by the courts as being the exercise of a judicial power by a legislative body, and must always be determined

Congress would have no power to issue treasury notes. Butler seconded the motion. Madison thought they had better simply insert a prohibition to make them a legal-tender, evidently showing that he thought, if the power to emit bills were conferred in that simple way, that the government would have authority to make them legal tender. Morris, that striking out these words would still leave room for a responsible minister to emit treasury notes. Gorham thought that leaving out the clause would be better without inserting any prohibition, thinking that the words as they stood would suggest and lead to the emission. Mason thought Congress would not have power unless expressed (thus differing from Morris), and expressed himself as unwilling to tie up the hands of the government by such a prohibition. Gorham thought that the power so far as safe would be involved in the borrowing power. Mercer was opposed to a prohibition for two reasons: 1st, he was in favor of paper money on general principles. 2nd,

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as of no effect at all so far as regards acts performed before such declaration. (See 39 Penn., 137; Cooley's Limitations, p. 113.)

The clearest manner, therefore, in which legislative intent can be ascertained, i. e., by a formal vote on the very question of meaning, has no binding force whatever on the courts.

As Smith writes it:

When we once know the reason which alone determined the will of the law-makers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason, and as will be best calculated to effectuate that intent. Great caution should always be observed in the application of this rule to particular given cases; that is, we ought always to be certain that we do know and have actually ascertained the true and only reason which induced the act. It is never allowable to indulge in vague and uncertain conjecture, or in supposed reasons and views of the framers of an act, where there are none known with any degree of certainty. (Smith on Stat. and Const. Const. 634).

it would not do to excite opposition of friends of paper money by a prohibition, evidently thinking if nothing were said about it, that every man would be entitled to his own opinion on the subject. Ellsworth thought it was now a good time to shut and bar paper money out, but he did not indicate whether this would, in his view, be accomplished by simply saying nothing about it. Randolph was opposed to depriving the government of the power altogether. Wilson thought it would be good to preclude paper money, but did not indicate how he thought it could be accomplished, whether by prohibition or by simply saying nothing about it. Butler was also in favor of taking away the power, but did not indicate how it had better be put. Read and Langdon were also opposed to giving this power to Federal Government, but did not indicate how their ideas should be incorporated.

The clause was then cut out by a vote of nine States to two. Madison adds a footnote that he decided the vote of Virginia by voting for cutting it out because he had become convinced that the government would have the power of issuing government notes as far as they could be safe and proper, and would only cut off the pretext for a paper currency. He does not give us the course of argument by which he arrived at this. Nor does he give us any clue as to whether the other members of the convention agreed with him. In a word, it is a purely private opinion of Mr. Madison which events have proved to be wrong. This is not the first time that an individual, in drawing a public document, thinking that he had included and excluded certain things, found out afterwards, when the instrument came up for adjudication, that he had made a mistake.

It is evident that nothing definite can be inferred from this record as to the intention of the convention.[1]

About all that we can assert is that several members were in favor of refusing this power to the Federal government, that some were in favor of conferring it, that those who spoke on the topic were in doubt as to the effect of simply dropping the clause, and that as a matter of fact the clause was dropped. We have absolutely no means of knowing whether the majority of the delegates or states were opposed to granting this power, whether they thought that cutting out this clause would leave the question an open one, or, with Madison, that it

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[1]Cooley states the law as to the proper use of the proceedings of the convention, thus:

"When the inquiry is directed to ascertaining the mischief designed to be remedied or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument; where the proceedings clearly point out the purpose of the provision this aid will be valuable and satisfactory; but where the question is one of abstract meaning it will be difficult to derive from this source much reliable assistance in interpretation. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of the majority of the convention in adopting a particular clause. It is possible for a clause to appear so clear and unambiguous to the members as to require no discussion, and the few remarks concerning it may be positively misleading. It is also possible for a part of the members to take the clause in one sense and a part in another. And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if this meaning appears not to be the one which the words would most naturally and obviously convey. For as a constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people." (Cooley Limitations, p. 80.)

would give us all the benefits and none of the evils of a paper currency, or whether they thought that the government would still have the power under other grants, and that they could safely afford to let the matter rest or whether they thought anything at all about the matter. One thing, however, is significant, and that is that several members thought that if the clause to emit bills on the credit of the United States were left standing, it would carry with it, in the absence of a special prohibition, as a matter of course, the power to make them legal-tender, and others thought that the power to emit bills would be inferred under the borrowing power. As a matter of fact, the power of the government to emit bills of credit is as well acknowledged as any other power of the Federal legislative, or, as Chief Justice Chase decided in Veazie Bank vs. Fenno, it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit, and, that too, though the record distinctly shows that a clause conferring this power was struck out of the constitution as first presented after some debate.

There is, I suppose, little doubt that many of the most eminent men of the revolution thought that the power of making treasury notes a legal tender should not be granted to the Federal government. But their ideas before they went into the convention, have nothing, of course, to do with what was actually achieved. As the result of discussion a compromise was accepted, and like many another compromise the meaning of the instrument can not be ascertained by consulting those who are interested in a certain interpretation by securing the general

acceptance of which they would have gained their case.

As to what the early men thought the constitution, as actually adopted, really did say on this topic, we also have no satisfactory evidence; but such as there is of it is rather in favor of the view that legal-tender power was conferred on Congress by the constitution. When we look in the *Federalist*, for example, to find out what was said on this point, we find curiously enough nothing whatever upon the subject. It must be a matter of surprise to every one, that if the case were so clearly made out as it claimed to be by those who hold this view, there should be no mention of the subject in this important series of papers. If the leading men of all parties were so clear in their ideas as to the importance of refusing this power of making a legal-tender, and were so confident that it really had been done, and it had really occupied such an important position in the public mind, it is remarkable that there should be absolutely no express reference to the matter.

It is also astonishing, if the view of those who think the power of making anything but gold and silver coin a legal-tender was denied the Federal government were correct, that there are so very few traces of any reference to the fact in the current discussions of the time in the conventions or in the press, especially if the general interest in the subject were so active as they would have us believe. There are almost no notices at all, even of the fact that paper emissions were forbidden to the states. Luther Martin's letter only proves that he was doubly mistaken, since he speaks of the erasure of the clause "to emit bills" as the denial of such power to Congress, when events have proven that he was mistaken.

Of contemporary opinions as to this point, the one of Hamilton, expressed in 1790, December 13th, as Secretary of the Treasury, in a letter to the House of Representatives, is important. He says: "The emitting of paper money by authority of the government is wisely prohibited to the individual states by the national constitution; and the spirit of that prohibition ought not to be disregarded by the Government of the United States." Here in the very act of opposing the exercise of the power, he conceded its existence. He virtually admits the authority of Congress to do what he thinks they ought not to do as a matter of policy.[1]

The appeal is also made to the opinion of commentators and jurist and statesmen from the beginning of the Government down to the present.

Marshall is first appealed to. The court in the last decision shows however pretty plainly that Marshall's opinions contain nothing adverse to the power of Congress to issue legal-tender notes. Even in the case of the Articles of Confederation, which said explicitly that all powers not expressly delegated to the United States were retained by the states, Marshall was not willing to say that they did not confer the right to make the notes a legal-tender. He spoke very guardedly, saying simply that Congress did not, as a matter of fact, make the notes a legal-tender; "perhaps," he adds, "they could not do so," and as if giving a ground for this opinion, he remarks further, that this power resided in the states. But even this

[1] "Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries." (Story in Const. § 407

reason, which was seemingly the only one which occurred to the judge for his opinion does not of course exist under our present constitution, by which this power is expressly prohibited to the states.

Webster's opinion is also quoted and made very much of. It is exceedingly interesting to study Webster's opinion on this topic, for it serves to show several important points in regard to the subject. The opinion commonly quoted is an expression used by him in a debate with Benton, in which Benton twitted him with being willing to abolish the money of the constitution, etc. It was not at all necessary for him in that connection to join issue with Benton on the general question, and like a skillful debater, he granted whatever was not necessary to his argument. We have, however, luckily, a formal opinion prepared by him on this very topic shortly afterward, by which he declared he was willing to stand or fall, as expressing his most matured convictions on this important topic.

He laid down four propositions, as follows :

1. The coinage power includes the power to maintain along with the coin a paper currency.

2. Congress has power to emit bills of credit.

3. The power to regulate commerce carries with it the power to provide a paper currency for the whole country.

4. The power of Congress to emit bills of credit is derived from the prohibition on the states. These were all sub-propositions in support of a main proposition that it was the duty of Congress to provide such a currency for the country. The logical inference from these propositions, in regard to the power of Congress over the legal-tender, were first drawn in

the case of Jiullard vs. Greenman, in the year 1884.

Story is also quoted. From his commentaries doubtless, for as a judge on the bench in the same year as Webster announced his mature convictions, viz.: 1837, in the case of Briscoe vs. the Bank, (11 Peters, 348) he supported Webster's views, at least so far as related to the power of Congress over a paper as well as a coin currency.

Thirty-three years later, in the celebrated case of Veazie Bank vs. Fenno, the court held the soundness of Webster's views, and practically approved his first three propositions.

Fourteen years later the court again finds the question before it in a more advanced state, viz.: Can Congress impart a legal-tender character to the currency which it is thus enabled to provide? And almost unanimously the court decides that such currency, being as before decided a constitutional currency, Congress might give to it any legal character which properly belongs to currency as such, it not being prohibited by the constitution.

So much for what may be called the negative argument. It seems to me plain that the case of those who maintain that Congress has exceeded its power, in making paper money legal-tender, is not and can not be made out. In other words that, to use the expression of the court, they have not "succeeded in demonstrating clearly and beyond question that such power is forbidden by the constitution or not conferred." It can scarcely be said, even at the most, that they do more than raise a doubt in regard to the matter, and this as we have seen, is not sufficient. There are various corroborative arguments which I must pass over.

On the other hand there is a positive argument in favor of the view that the constitution confers this power on Congress, which should not be overlooked. It is evident from a consideration of the constitution as a whole, that the constitution does confer all the power in regard to the currency which is conferred on any element in our system. If sovereignty in regard to the currency is not conferred on Congress, then it has certainly not been conferred at all. Now, if we follow out the precedents already given us by the early interpreters of the constitution, and confirmed by the decisions of many a later one in construing the constitution, we shall have no difficulty, I think, in showing pretty clearly that this power was actually conferred, and that Congress was actually right in so considering it.

In the first place, in order to ascertain the meaning of constitutional phrases, we are compelled to examine the history of cotemporaries, and particularly that of the English nation. The constitution is filled with phrases which are absolutely unintelligible except as they are explained by the course of history. In construing such an instrument as the constitution, we may expect to find, says Mr. McMurtrie, terms which had been used as embodying royal or imperial prerogatives. In conferring or limiting powers in the constitution, no words were used which were unfamiliar to English ears. Almost every term was a word of art, the meaning of which could be ascertained only by reference to what it meant in the development of English political and private law. Consider the terms law and equity, bills of attainder, *habeas corpus*, freedom of the press and of speech and many others. The only way to ascertain the meaning of these terms

is to go to English law; outside of that they have no meaning at all. Take, moreover, such grants as that making the President commander-in-chief of the army and navy. How is it possible to find out how much was granted under this phrase, except by having regard to what it meant in English law and in the customs and habits of civilized Europe. Our ancestors were a hard-headed practical race, which used these terms in well defined meanings, or at least regarded as a matter of course, that the meaning was to be ascertained in a regularly defined method.[1]

Now it is a conclusion borne out by all the decisions of our courts, that the meaning of such grants as were given, the meaning of terms used in them, etc., was to be found by references to the custom and habits of other civilized nations. If sovereignty over any matter is committed to the national government, then the content of that form of sovereignty is to be determined by reference to what it contained in other civilized nations, and especially in England. Even Mr. Field, who dissented from the last decision of the court in the legal-tender case, on the ground that there could be no incidental powers of sovereignty in the case of a limited government, at the same term of court held, in the case of U. S. vs. Jones, 109 U. S.

[1] As Cooley puts it:

It must not be forgotten, in construing our constitutions, that in many particulars they are not the legitimate successes of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history, and when we find them expressed in technical words and words of art, we must suppose these words to be employed in their technical sense.

513, that the right of eminent domain was an incident of sovereignty. In a word, it seems that the position of the court in the last case is absolutely unassailable on principles of law or politics, that when a particular sovereign power is granted, the only mode of ascertaining how it may be exercised, i. e., what the grant meant to convey, is to inquire what was the usage among the civilized nations in respect of that power. And the right to the same usage then vests in the United States government, restrained only by restrictions imposed by that instrument itself.

The only question then which we have before us is, what the right "to coin money" meant at that time. This, fortunately, we can ascertain easily from the literature and practice on the subject to be found in England and on the continent at that time. It is pretty well proven that the right to coin money or right of coinage was a general phrase in common use at the time, and for a long time before the Revolution, to designate sovereign power in regard to the currency. It was used as an ordinary means of indicating that certain princes had the complete sovereignty in regard to the circulating medium; and that this included, as a matter of law and fact, the right to declare anything the government pleased to be a legal tender, is evident from the financial history of every European country.

To put it in a nut shell then, the right to coin money meant sovereign power over the currency, (as it was used at the time) and this power was conferred on the general government, and it carried with it in the absence of restrictions the same sweeping power which other sovereignties had at the time.

It is held by some that "money," under the consti-

tution, means only coined money, i. e., gold and silver coins. Now Justice Field says in his dissenting opinion in the last legal-tender case, that it is a settled rule of interpretation that "the same term occurring in different parts of the same instrument shall be taken in the same sense, unless there be something in the context indicating that a different meaning be intended." Now if this be true it overthrows his case, since it is evident that "money," in the clause "no money shall be drawn from the treasury except in consequence of appropriations to be made by law," includes treasury notes, greenbacks, national bank notes, etc., etc., in which case, on Field's theory, "money," in the phrase *to coin money*, would also include all these varieties of notes.

This is not the argument which the court in its last decision advances in support of its views, though it refers to it as entitled to consideration. The power to make a paper currency was subsumed by the court under the power to borrow money. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of these notes as currency is as broad as the like power over a metallic currency under the power to coin money and regulate the value thereof.

The actual decision of the court deserves to be quoted in full: The Congress, as the legislature of a sovereign nation, being expressly empowered by the constitution to lay and collect taxes to pay the debt and provide for the common defence and general welfare of the United States, and to borrow money on the credit of the United States, and to coin money and regulate the value thereof, and of foreign coin, and

being clearly authorized as incidental to the exercise of those great powers to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes and national bank bills, (all of which let it be noticed is admitted now to be constitutional doctrine), and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the constitution, we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts, is an appropriate means conducive and plainly adapted to the execution of the undoubted powers of Congress consistent with the letter and spirit of the constitution, and therefore within the meaning of that instrument necessary and proper for carrying into effect the powers vested by this constitution in the government of the United States. Such being our conclusion in matter of law, the question of expediency is not for us to decide, they add in effect.

It is not perfectly clear from this passage exactly on what ground they place their decision, but that can be ascertained from other portions of the opinion. It is evident, however, from a reading of the opinion of the court, that the interpretation which Mr. Bancroft and Mr. Justice Field himself put upon the words of the court are not justifiable, when they would make the court appear to say that the Government of the United States has all the sovereign powers which other governments enjoy, and which are not expressly prohibited to it. Since the court

explicitly says that it is a government of limited powers, only that when the constitution gives to it sovereign powers in any matter, as for instance, borrowing money, and does not accompany it with restrictions as to the method of exercising it, it has all the rights of other similar governments at the time of the adoption of the constitution. And this is the doctrine of every court since the days of Marshall on every similar question which has come before it.

I cannot resist the conviction that the result of this long discussion in the Supreme Court foreshadows the ultimate decision of more and more of our constitutional students until it will be as generally accepted to be sound constitutional law, as is the decision of the court that the government has the power "to emit bills" under the constitution. A progress from a minority in 1869 to a majority of one in 1870, for the constitutionality, and to an almost unanimous opinion (eight votes being in favor and only one against) fourteen years later, properly forecasts, I believe, public opinion outside since, as a matter of law, it is bound to prevail in the long run.

The arguments against this cumulative proof that the constitution vests this power in the Federal government, all prove too much, and if pursued to their logical conclusions, they would result in over-turning some of the most widely acknowledged views of the Supreme Court.

As to its effects on the political development of the country, I think personally that it will be good. It is desirable that somewhere in the body politic should be placed the full and complete power over the legal-tender. On this topic the words of Alexander Ham-

ilton on a similar subject commend themselves to me. In No. 34 of the *Federalist* he says :

"In pursuing this inquiry we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil governments are not to be framed on a calculation of existing exigencies; but upon a combination of these with the probable exigencies of ages according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power proper to be lodged in the National government, from an estimate of its immediate necessities. There ought to be a capacity to provide for future contingencies as they may happen, and as these are illimitable in their nature, so it is impossible safely to limit that capacity."

The time may come, as it has already been here, when it may be desirable to alter the legal-tender. To deny this power to the Federal government is to deny it to any part of our legislative power ; requiring an amendment to the constitution before any change could be made. The objection that if such a power exists it is liable to abuse, has of course much force, but it proves too much since it might be urged in regard to nearly all other powers. If circumstances should ever again arise under which the government should find itself obliged to have recourse to the use of this power, we may be sure it would be resorted to (constitutional amendment or no amendment) and the evil result attending a breach of the constitution would be manifold more than any evil results likely to arise owing to the exercise of the acknowledged power. Moreover, we now see that we must rely on the education of the people in sound doctrines in order to protect us against the evils of the exercise of such a power, instead of on the more or less weak bulwarks of constitutional prohibition, and I, for one, believe in the light of our financial history for the last twenty years, that we are safe in assuming that the people can be trusted in the future as in the past

to maintain a sound currency under all conditions, except possibly those where circumstances would compel a resort to such an evil instrument as an excessive paper currency—no matter what might stand in the constitution.

Whatever one may think of this, however, whatever his views upon the expediency or folly of giving to Congress the power of issuing paper currency, I feel sure that the oftener he considers the question from the only proper point of view, viz. : the legal or constitutional one—the more irresistible will be the conviction that the court, in this last case, has finally given us a decision which will stand the test of time, because, in full harmony with the great principles of constitutional interpretation which were laid down by our early jurists, were followed by all later courts, and have been accepted by the people as fundamental to our political system.

NOTE.

The authorities specially consulted in preparing this paper, aside from the argument before the courts and the opinions of the courts themselves, are the following :

(1.) Mr. Bancroft's "Plea for the Constitution;" (2.) Mr. McMurtrie's "Observations on Mr. Bancroft's Plea;" (3.) Articles in Law Magazines, (*a*) H. H. Neill in Columbia Jurist, Vol. II, No. 1; (*b*) D. H. Chamberlain in American Law Review, April 1884; (*c*) T. H. Talbot in American Law Review, Vol. XVIII, p. 618; (*d*) Prof. Thayer in Harvard Law Review, Vol. I; (4.) Elliot's Debates, and similar sources.

Statements of arguments have been taken in some cases almost *verbatim et literatim* from one or another of the above sources.